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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 356

I. POSNER, INC.; POSNER DISTRIBUTING CORP.; POSNER BEAUTY AND BARBER SUPPLY CORP.; HAMILTON POSNER,

Petitioners,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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July 15, 1965

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I. POSNER, INC.; POSNER DISTRIBUTING CORP.; POSNER BEAUTY AND BARBER SUPPLY CORP.; HAMILTON POSNER,

Petitioners,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, I. Posner, Inc., Posner Distributing Corp., Posner Beauty and Barber Supply Corp., and Hamilton Posner, pray that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Second Circuit entered in the above entitled cause on March 30, 1965, enforcing as modified an order of the respondent, National Labor Relations Board.

Opinion Below

The opinion of the court of appeals is reported at 342 F. 2d 826. This opinion is set forth as Appendix A hereto, *infra*. The decree of the court of appeals, dated March 30, 1965, is set forth as Appendix B hereto, *infra*.

Jurisdiction

The opinion of the court of appeals was filed on March 15, 1965, and its decree was entered on March 30, 1965. On June 4, 1965, Mr. Justice John M. Harlan, granted an order extending the time of petitioners to file their petition for a writ of certiorari to and including July 16, 1965. The jurisdiction of this Court is invoked under Title 28, United States Code, §1254(1).

Questions Presented

The questions presented in this case are as follows:

1. Whether petitioners were afforded a fair hearing at the hands of the board's hearing examiner.

2. Whether the findings of the board, as to alleged unfair labor practices on the part of petitioners, as modified by the court of appeals, were supported by competent, credible substantial evidence.

3. Whether the order of the board and the decree of the court of appeals, directing the reinstatement with back pay, of eight former employees of petitioners, was warranted and proper in the circumstances of this case, in light of the fact that petitioners were compelled to shut down the major part of their business as a result of a fire which destroyed their factory premises.

Statutes Involved

The statutes involved in this cause are as follows:

Title 29, United States Code

§ 158 *Unfair labor practices.*

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

§ 160. *Prevention of unfair labor practices—*

Powers of Board generally

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter.

STATEMENT OF THE CASE

Proceedings Before the Board

On August 3, 1962, a petition was filed with the board by District 65, RWDSU, AFL-CIO, seeking a certification of said union as the collective bargaining representative of the employees of the corporate petitioners (356-358).[1] There is no indication in the record as to when this petition was served upon petitioners, but since it was first filed on August 3, 1962, presumably it was processed by the board and served upon petitioners sometime later. Following the filing of this petition, a representation election was held in which the union was not chosen as the bargaining agent for the employees (356-366).

Thereafter, on September 27, 1962 and October 31, 1962, the union filed charges of unfair labor practices against petitioners with the board. On November 30, 1962, the General Counsel of the board issued and served an order consolidating the two cases, with a consolidated complaint and notice of hearing (338-340). On December 10, 1962, petitioners (respondents before the board) filed an answer in which they specifically alleged "that I. Posner Inc. and Posner Distributing Corp. were destroyed by fire on the 12th day of November, 1962" (341).

At the hearing before the trial examiner of the board, evidence was offered to show that nine certain employees were discharged for alleged union activities.[2] As to one such employee, Selwyn Hutchinson (23-24), the examiner held that his discharge was not related to "union activity." Accordingly, as to him the complaint was dismissed. As to

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[1] All numbers in parentheses refer to pages in the Joint Appendix filed in the Court of Appeals, unless otherwise indicated.

[2] See the trial examiner's decision, pp. 13-24.

the eight others: Norma Pinero (13-14), Ricardo and Marcos Ortiz (14-17), George Gordon (17-18), Guillermo Cuellar and Antonio Coello (19-20), and Pedro Santiago and Arthur Cooper (20-23), the charges were found to be sustained and reinstatement with back pay was ordered.[3]

The substance of the charges against the petitioners were that they engaged in unfair labor practices by warnings and directions to employees, threats to employees and the discharge of employees for engaging in union activity, in alleged violation of §8(a)(1), (3) and (4) of the Act (29 USC §58(a)(1), (3) and (4)). Petitioners denied the charges.

It was undisputed in the record that the premises of I. Posner Inc. and Posner Distributing Corp. was completely destroyed by fire on November 12, 1962 (239-240). Posner Beauty & Barber Supply Corp. remained at the former location, 111-115 West 128th Street, New York City, while the other corporations moved to 50-25 38th Street, Long Island City. The operations of I. Posner Inc. as a manufacturing concern were completely halted following the fire, while Posner Distributing Corp., a sales organization, was severely curtailed in its operations. I. Posner Inc. manufactured wigs and hair goods, and at the time of the hearing employed 12 or 13 people (240), whereas before the fire, it had employed about 70 people (243). The other petitioner, Posner Beauty and Barber Supply Corp., before the fire, employed 12 to 15 people. Before the fire there was a total of over 100 employees in all three corporations (297).

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[3] The court of appeals found that the discharge of Marcos Ortiz under §8(a)(4) of the Act, was not supported by substantial evidence, but nevertheless directed his reinstatement with back-pay on the theory that he had been discharged for union activity, in violation of §8(a)(3) of the Act, 342 F. 2d 826, 829-830. Actually, as the court of appeals apparently overlooked, Marcos Ortiz was not discharged. He was not rehired after the devastating fire in petitioners' factory.

As to the individual employees concerned in this case, the following is a statement of the pertinent evidence relating to their particular cases:

1. Norma Pinero was employed by petitioners making foundations for wigs (70). She was discharged on July 20, 1962, for cause (83, 308, 325). The record is barren of any evidence imputing knowledge to petitioners that she was engaged in any union activity and that this was the reason for her discharge. The record establishes that the first time petitioners learned of organizing activity in the plant was on August 6, 1962, according to the testimony of the union organizer Mr. Al Evanoff (40), when he met Mr. Hamilton Posner for the first time (41).

2. Ricardo Ortiz was employed in the manufacturing process of wigs and hair goods, in the acid and washing department (141-142, 146). Ricardo was laid off on or prior to August 3, 1962 because things were slow in his department (308). He was never replaced, either before or after the fire. The record is barren of any evidence that petitioners knew of his union activities or adherence at the time of his discharge. Ricardo, in fact, testified that he never wore a union button to work, nor did he wear it at the plant (165). The record discloses, as stated above, that the earliest date on which petitioners knew of organizing activity was on August 6, 1962 (40, 41).

3. Marcos Ortiz, the brother of Ricardo, also worked in the acid and washing department of wig manufacture (164). He was not discharged, but rather, after the fire, found another job and never obeyed a call to return to work. Marcos testified that he told Leon Glasser that he might have another job (157-518). Mr. Glasser testified that Marcos told him the union had gotten him another job (318-319), while Mr. Posner testified that Marcos told him he had

another job (311). This testimony was never denied or refuted by Marcos. Even though Marcos was not discharged, he was not replaced after the fire (318-319). It is to be noted that as between these brothers, Marcos and Ricardo Ortiz, Marcos was retained after August 3, 1962, when Ricardo was laid off, because he was a better worker than his brother (309). Mr. Posner testified that Marcos was "too good a worker" to lose, and that he would most likely have been employed today (311), except for the fact that he never returned to help with the salvage work after the fire, when he was most needed (312). In any event, the fire reduced the number of needed employees to a bare minimum. The board found that it was an unfair labor practice to fail to rehire Marcos after the fire. Marcos concededly received a call to return to work (155), but instead of coming in at the usual hour, he came in later in the day and stated he had another job (156-158, 311, 318-319).

4. George Gordon was hired on August 1, 1962, through the recommendation of Selwyn Hutchinson. Mr. Posner had offered employment to Gordon to enable him to obtain an immigration visa to come to this country from Panama (215, 309). He worked for one week in the shipping department and was discharged as being very unsatisfactory (309). There was no substantial evidence that he was discharged for union activity.

5. Guillermo Cuellar was employed as a general assistant in the factory (90). Cuellar had previously worked for petitioners and had fractured an arm or dislocated a shoulder (106-107, 309), disabling him from doing heavy work (309). He was employed in placing jars in boxes, but lacked the required adeptness for such work (310). A bottleneck occurred in his department, leading to his replacement by women who were more adept at this work.

Union activities had nothing whatever to do with his discharge (310).

6. Antonio Coello worked in the same department as Cuellar. He was a slight man and unable to do heavy work (330). He too was employed in placing jars in boxes, but lacked the required adeptness (310), and was replaced, along with Cuellar, by women. He was not discharged for any union activity (310).

7. Pedro Santiago was employed for a number of years in the shipping department. After the fire destroyed the factory, his name and telephone number were taken by Jack Ebers, a supervisory employee, and he was told he would be called back to work (188). However, he apparently took another job (200-201), for he was not at home to receive the telephone calls made to him to return after the fire. Mr. Posner testified that he did not ask Santiago to leave or fire him, and that he just did not show up for work; that every man who showed up after the fire was needed to help with the salvage and all were employed, until later when most of them were laid off for lack of work (312). There was no proof that Santiago was not rehired after the fire for any union activities.

8. Arthur Cooper was a truck driver employed by petitioners (223). He was retained after the fire, but subsequently was laid off when the products he had been delivering were no longer being manufactured. He was not replaced by any other truck driver (234, 312). There was no proof that he was laid off for union activities.

The transcript of the hearing before the hearing examiner clearly demonstrates that the hearing was conducted with great bias and animosity by this hearing examiner against petitioners and their counsel. The examiner dem-

onstrated great impatience with everything done by petitioners' counsel, ridiculed and derided him, cut off lines of legitimate inquiry and examination, and let it be known in no uncertain terms that he sided with the board and union. He failed utterly to display that degree of impartiality required in proceedings of this kind.

A few examples of the manner in which this hearing was conducted, as seen in the record, are as follows:

1. "Trial Examiner: I thought you were anxious to get this case over with?

Mr. Drimmer: I am very anxious.

Trial Examiner: Then I suggest you withhold some of these curious objections. I overruled your objection. Let's not argue it. Answer the question." (73)

This colloquy followed counsel's objections to a series of leading questions to the witness Norma Pinero. In context, the statement of the examiner was both uncalled for and rude.

2. "Trial Examiner: May I ask what this has to do with his direct examination? I don't recall having heard this name before?

Mr. Drimmer: Permit me just two questions and you will get the relevancy.

Trial Examiner: I want to know what the relevancy is now before I permit any more and waste more time. What part of his direct examination does this bear on, if any?

Mr. Drimmer: Particularly on credibility. Secondly, on the question of his observation and thirdly, from the standpoint of the duties that he testified that certain people performed.

Trial Examiner: He didn't testify about McNeil.

Mr. Drimmer: I'm trying to show that certain work was performed by McNeil and not by the people he mentioned.

Trial Examiner: All right, I will sustain the objection." (109)

This occurred when no objection had been made by counsel for the other parties to the proceeding.

3. "Mr. Drimmer: I object to that question.

Trial Examiner: The objection is overruled.

Mr. Drimmer: And this, I might also say, that this question has nothing to do with the language barrier of this witness. It is highly irregular. It calls for the operation of the witness' mind.

Mrs. Morio: Mr. Whittemore, I have—

Trial Examiner: Mr. Drimmer, I have overruled your objection. You have an automotic exception. If you continue these arguments after I have ruled, I'm just going to adjourn the hearing and let some other attorney take over in your place.

* * * * *

Trial Examiner: I'm not going to have this hearing upset continuously by your arguing after I have ruled.

Mr. Drimmer: I might note this, that when the counsel to the Board makes an argument, you listen to them very intently, they take a lot more time than I have. And I am not trying to delay this hearing at all. I have an objection and I intend to press my objection to the best of my ability so I can properly protect my client's interests. And if you are telling me not to do so, I'd like to note that." (170-171)

There are many more examples in the record of the hearing examiner's improper conduct of this hearing. His

demeanor was such that he indicated complete belief in all the testimony of the board's witnesses and none at all in the petitioners'' witnesses, and his attitude was such as to demonstrate his bias and prejudice against petitioners. They did not have a fair hearing at his hands.

The Record

The record in this cause before the Court of Appeals consists of the Joint Appendix filed with the petition for enforcement of the Board's order. Nine copies of this joint appendix are filed with this Court for this proceeding.

Reasons for Granting the Writ

The reasons for granting the writ of certiorari in this cause relate essentially to the conduct of the board's hearing examiner in this case; to the sufficiency of the evidence to support the findings; and to the scope of the order of the board and the decree of the court of appeals, directing reinstatement with back pay of the eight former employees in light of the fact that petitioners' factory premises were destroyed by fire.

1. Petitioners were not afforded a fair hearing by the board's hearing examiner. The record of the board proceedings are unmistakeably clear as to this point. Petitioners are aware that ordinarily this Court does not concern itself with the conduct of hearing examiners in administrative proceedings. However, taken together with the lack of evidence in the record to support the board's findings, the demonstrable unfairness of the hearing should be reviewed under this Court's supervisory power over the conduct of federal administrative proceedings. The record is replete with examples of the examiner's bias and

prejudice against petitioners and their counsel, and three such examples are set forth hereinabove.

The attitude of the hearing examiner in uniformly crediting the witnesses produced by the General Counsel, and discrediting all of petitioners, whether or not the latter were contradicted or corroborated, exhibited that degree of bias which deprives the examiners findings as to credibility of the weight usually accorded them. *N. L. R. B.* v. *Miami Coca-Cola Bottling Co.*, 222 F. 2d 341, 345 (5th Cir., 1955); *N. L. R. B.* v. *National Paper Co.*, 216 F. 2d 859, 868 (5th Cir., 1954). In the leading case of *N. L. R. B.* v. *Phelps*, 136 F. 2d 562, 563, 564 (5th Cir., 1943), Chief Judge Hutcheson wrote:

> "* * * a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge. Indeed, if there is any difference, the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed. Nor will the fact that an examination of the record shows that there was evidence which would support the judgment, at all save a trial from the charge of unfairness, for when the fault of bias and prejudice in a judge first rears its ugly head, its effect remains throughout the whole proceeding. Once partiality appears, and particularly when, though challenged, it is unrelieved against, it taints and vitiates all of the proceedings, and no judgment based upon them may stand."

Although total rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact (*N. L. R. B.* v. *Pittsburgh Steam Ship Co.*, 337 U. S. 655, 659 (1949)), nevertheless in this case such conduct was coupled with a demonstrable bias during the course of the hearing, so as to require a new hearing or new finding. As one example of how this bias worked, the failure to rehire Marcos Ortiz and Pedro Santiago after the fire destroyed petitioners' plant, was treated as an unfair labor practice. Yet all efforts of petitioners' counsel to prove that these men were not rehired because they took jobs elsewhere were frustrated by the hearing examiner sustaining all objections to inquiries along this line.

In this case the record is clear that petitioners did not have a fair hearing. Certiorari to review the record should be granted. See, e.g. *Inland Steel Co.* v. *N. L. R. B.*, 109 F. 2d 9 (7th Cir., 1940); *Montgomery Ward & Co.* v. *N. L. R. B.*, 103 F. 2d 147 (8th Cir., 1939); *N. L. R. B.* v. *Washington Dehydrated Food Co.*, 118 F. 2d 980 (9th Cir., 1941); *Local No. 3* v. *N. L. R. B.*, 210 F. 2d 325, 329, 330 (8th Cir., 1954), among other cases, and in addition to those cited above.

2. The findings of the board as to the alleged unfair labor practices by petitioners, as modified by the court of appeals, were not supported by substantial evidence. In each of the cases detailed in the record, as to the circumstances of the discharge of various employees, and how several left after the fire to take other jobs, the record is overwhelmingly clear that the findings of unfair labor practice were not based upon the evidence, but rather on the apparent bias and prejudice of the hearing examiner towards the petitioners and their counsel. The hearing examiner excluded from the record all attempts by the petitioners to show the fundamental circumstances

under which employees were discharged, and how several left of their own accord after the fire (155-158, 188, 312).

For example, two employees, Norma Pinero and Ricardo Ortiz, were discharged before petitioners knew of union organizing activity; two others, Guillermo Cuellar and Antonio Coello were unable to do the work assigned to them; George Gordon worked only one week, the week of August 1, 1962, and was discharged at the end of that week as being very unsatisfactory; Arthur Cooper was laid off after the fire solely for lack of work; and the other two, Marcos Ortiz and Pedro Santiago, quit after the fire and were not rehired.

In these circumstances, even if petitioners had a fair hearing, the findings of unfair labor practices were not supported by substantial evidence, within the test of *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474 (1951). Although an analysis of the record is required to determine the evidence supporting the board, such analysis will show that the findings lack support in the record. The burden of proving the charges of unfair labor practices charged in the complaint is upon the board,[4] and does not shift to petitioners. Moreover, as this Court has stated in the classic test:

> "Substantial evidence is more than a scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (*Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 229 (1938).

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[4] *N. L. R. B.* v. *Reynolds International Pen Co.*, 162 F. 2d 680 (7th Cir., 1947); *N. L. R. B.* v. *National Die Casting Co.*, 207 F. 2d 344 (7th Cir., 1953); *American Smelting & Refining Co.* v. *N. L. R. B.*, 126 F. 2d 680 (8th Cir., 1942); *Local No. 3* v. *N. L. R. B.*, 210 F. 2d 325 (8th Cir., 1954).

That the findings fail to meet the test of substantiality developed by this Court is undoubted.

The board and the court of appeals have relied upon a contention that there is "a background of union hostility and discrimination" (342 F. 2d 826, 828) on the part of this employer, citing, without analysis, two prior cases before the board and one before the court of appeals.[5] This purported "hostility and discrimination" is then treated as a species of evidence to support the board's findings against petitioners. It may be assumed that for this reason both the board and the court of appeals approached this case with a pre-conceived notion that this employer is guilty of unfair labor practices solely because he has a purported anti-union bias, without any reference to the facts of the case. Such pre-conception may have been a decisive factor in the board's determination of employer motivation herein, and this, it is submitted is improper.[6] The prior cases between this employer and the board resulted in complete compliance by petitioners with the board's orders and the court's decree of compliance. Moreover, an employer is permitted by law to resist unionization, provided he does so within the provisions of the act.[7] To rely upon prior cases, as the board and court

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[5] *N. L. R. B.* v. *I. Posner, Inc.*, 304 F. 2d 773 (2nd Cir., 1962). In this case, the court of appeals partially enforced an order of re-instatement of striking employees. There the union did not represent a majority of the employees, but nevertheless it demanded their reinstatement. The court ordered the reinstatement of six employees, and as to three others, remanded the case to the board, the board having found these three guilty of strike misconduct. The union never did represent a majority of petitioners' employees. There was complete compliance by petitioners with the court's decree in this case.

[6] *N. L. R. B.* v. *Brown*, 380 U. S. 278 (1965).

[7] *Riggs Distler & Co., Inc.* v. *N. L. R. B.*, 327 F. 2d 575 (4th Cir., 1963); *Metal Processors' Union Local No. 16* v. *N. L. R. B.*, 337 F. 2d 114, 117 (D. C. Cir., 1964); *N. L. R. B.* v. *Redwing Carriers*, 284 F. 2d 397, 402 (5th Cir., 1960).

of appeals have done in this case, as the substantial basis for holding that the employer violated the act, is to run counter to the decisions of this Court and to deny fundamental due process to these petitioners.

It is petitioners' contention also that an employer may curtail or discontinue its business for economic reasons, and the fact that this has an incidental effect upon union organization within its plant, is not a sufficient basis for holding the discharge of employees to be in violation of the Act. *Textile Workers Union* v. *Darlington Manufacturing Company,* 380 U. S. 263 (1965). *Cf. N. L. R. B.* v. *Brown,* 380 U. S. 278 (1965). Here, unlike the *Darlington* case, the employer did not go out of business in order to prevent unionization of its plant; but, rather the employer suffered an economic catastrophe through the devastating fire in its plant. Nor is this a "runaway" shop, which is proscribed by the act.[8] In this case the employer tried to stay in business, but on a severely curtailed basis. The discharge or failure to rehire various employees under such circumstances is hardly an unfair labor practice, within the meaning of the act and within the various decisions of this Court interpreting the act. *N. L. R. B.* v. *Erie Resistor Corp.,* 373 U. S. 221, 227-228 (1963); *N. L. R. B.* v. *Burnup & Sims, Inc.,* 379 U. S. 21 (1964).

The findings in this case by the board and the court of appeals fail completely to conform to the "substantial evidence test" and certiorari should be granted to review this case.

3. The decree of the court of appeals directing the reinstatement, with back pay, of the eight former employees

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[8] See footnote 16 of the Court's opinion in the *Darlington* case, citing *N. L. R. B.* v. *Preston Feed Corp.,* 309 F. 2d 346 (4th Cir., 1962), among other cases.

of petitioners, was not warranted and proper, in light of the fact that petitioners were compelled to shut down a large part of their business and operations as a result of the fire which devastated their entire factory premises. Coupled with the paucity of evidence in this case to support the findings of unfair labor practices, at least so much of the decree as directs reinstatement of these employees, with back-pay, is unfair and unwarranted, in these circumstances.

Assuming *arguendo,* that the order of the board was supported by substantial evidence, nevertheless the scope of the decree enforcing this order is a matter properly to be reviewed by this Court in its supervisory function of enforcing the National labor-management relations policy, and because of the importance of the questions involved in this case.

Here through no fault of their own, and at a substantial economic loss, petitioners have been required to curtail substantially their business activities. Instead of employing over 100 persons, as they did before the fire, they now only employ about 35 or 40 (297). The contraction of their work force is an economic consideration which should be weighed by the board before ordering reinstatement with back pay. On the face of this record, this was not done by the board. Moreover, it has been held that where economic considerations necessitate a contraction in the employer's labor force, the employer in deciding which employees are to be retained must be free to choose from the more capable and the more worthy. *Martel Mills Corp.* v. *N. L. R. B.,* 114 F. 2d 624, 633 (9th Cir., 1940); *N. L. R. B.* v. *National Die Cast Co.,* 207 F. 2d 344, 349 (7th Cir., 1953).

In this case at least one employee, Ricardo Ortiz, was discharged for lack of work before the fire. After the fire there was no work for any of the eight employees. To re-

quire reinstatement of these employees, with back pay, in these circumstances is to inflict a punishment upon petitioners, and this is hardly permissible in attempting to vindicate the National labor-management relations policy.

Petitioners are not contending that a different rule should apply to reinstatement cases, than in other unfair labor practice cases (*N. L. R. B.* v. *Walton Manufacturing Co.*, 369 U. S. 409 (1962)), as to the substantial evidence test, or as to the practices to be followed in directing reinstatement with back pay. Nevertheless, the severe economic hardships sought to be imposed on petitioners by the present reinstatement with back pay order and decree, requires some measure of guidance by this Court in formulating proper standards to be followed by the board and the courts of appeal.

For these reasons, certiorari should be granted to review the decree and order entered in this case.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be granted.

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July 15, 1965

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 252—September Term, 1964.

(Submitted January 5, 1965 Decided March 15, 1965.)

Docket No. 29047

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

I. POSNER, INC., POSNER DISTRIBUTING CORP., and POSNER BEAUTY AND BARBER SUPPLY CORP., *et al.*,

Respondents.

Before:

LUMBARD, *Chief Judge,*
WATERMAN and HAYS, *Circuit Judges.*

Petition by National Labor Relations Board for enforcement of order, 145 N. L. R. B. 1190, based upon finding that respondents violated 29 U. S. C. §§158(a)(1), (3), and (4). Order enforced as modified.

ARNOLD ORDMAN, General Counsel; Dominick L. Manoli, Assoc. General Counsel; Marcel Mallet-Prevost, Asst. General Counsel; Melvin Pollack, Hans J. Lehmann, Attorneys, National Labor Relations Board, *for Petitioner.*

Appendix A

LEIGHT, DRIMMER & WEINSTEIN (Isidore Drimmer, of counsel), New York City, *for Respondents.*

WATERMAN, *Circuit Judge*:

The National Labor Relations Board petitions for enforcement of an order, reported at 145 N. L. R. B. 1190, based upon a finding that respondents violated Sections 8(a)(1), 8(a)(3), and 8(a)(4) of the National Labor Relations Act, 29 U. S. C. §§158(a)(1), (3), and (4). Specifically, the Board agreed with its trial examiner that respondents, in violation of Section 8(a)(1), had attempted to defeat a unionization campaign amongst their employees by threats of reprisals, offers of benefits, interrogation, surveillance, and restrictions on meetings between their employees and a union representative. The Board also agreed with its trial examiner that respondents, in violation of Section 8(a)(3), had discharged eight employees on account of their union activities, and that, in violation of Section 8(a)(4), one of these employees was also discharged for testifying at a Board hearing. The Board ordered the respondents to cease and desist from committing these and related unfair labor practices in the future, to reinstate the discharged employees with back pay, and to post the customary notices.

We hold that respondents were accorded a fair hearing by the trial examiner and that the Board's order was supported by substantial evidence, within the principles of *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474 (1951), except as set forth hereinafter.

The finding of unlawful interrogation was based upon a single encounter occurring at the start of the unionization

campaign, in which Jose Greenberg, a supervisor, asked Guillermo Cuellar, an employee, "what did [he] know about the Union, District 65," and "who were the leaders of Union 65." Since these questions were not inherently coercive, the Board's finding must be reviewed in the light of the doctrine stated in *Bourne* v. *NLRB*, 332 F. 2d 47, 48 (2 Cir. 1964): "Under our decisions interrogation, not itself threatening, is not held to be an unfair labor practice unless it meets certain fairly severe standards."

It is true, as the Board points out, that the encounter took place against a background of employer hostility and discrimination. See *I. Posner, Inc.*, 133 N. L. R. B. 1573 (1961); *I. Posner, Inc.*, 133 N. L. R. B. 1567, *enforced in part*, 304 F. 2d 773 (2 Cir. 1962). It is also true that the information sought by Greenberg could have been used to take action against individual employees, particularly the leaders of the unionization campaign in the plant, and that Cuellar's answer, namely that he had "only heard through rumors that the union was beginning . . .," was probably not strictly truthful. These facts have been regarded, in past decisions, as indicia of unlawful interrogation. *Bourne* v. *NLRB, supra; NLRB* v. *Firedoor Corp. of America*, 291 F. 2d 328, 331 (2 Cir.), *cert. denied*, 368 U. S. 921 (1961); *NLRB* v. *Syracuse Color Press, Inc.*, 209 F. 2d 596, 599 (2 Cir.), *cert. denied*, 347 U. S. 966 (1954).

At the same time, these decisions have looked also to the rank of the interrogator in the company hierarchy and to the setting in which the questioning took place. Greenberg was in charge of a single room in respondents' factory, in which twenty women worked. His questioning of Cuellar took place in Cuellar's home, where Greenberg formerly lived with the Cuellars and where, after Greenberg moved away, he often returned to visit Cuellar. The two men had

known each other for eight years, they were fellow Hondurans and close friends, and Greenberg had gotten Cuellar his job with respondents.

In view of the apparent brevity and amicable atmosphere of the questioning, we hold that the "fairly severe standards" required for a finding of coercive interrogation have not been met. The Board has adduced no other examples of allegedly coercive interrogation, although it has shown that respondents repeatedly committed other unfair labor practices. Accordingly, paragraph 1(c) of the Board's cease and desist order shall be modified so as to omit the words: "Unlawfully interrogating employees as to their union sympathies, . . ."

The Board based its finding of interference with the right to unionize, in part, on the following statement by the trial examiner.

> "On August 10, [1962] in the morning before work hours began, [Hamilton] Posner was again outside the plant as [Al] Evanoff [a union official] spoke with employees on the street. With four of them, Evanoff approached Posner and asked if they could talk to him regarding recent layoffs. Posner declined to talk to anyone from the Union. During the lunch period an even larger group went to Posner's office and asked to speak to him. After calling Posner, his secretary reported that he declined to talk to any employees while a union representative was present."

No claim is made that this conduct was a refusal to bargain, in violation of Section 8(a)(5). Nor would such a claim be justified, for the Board has presented no evidence that on August 10 Evanoff represented a majority of respondents' employees, or even that he would have been a

majority's representative but for respondents' unfair labor practices. Moreover, we have found no decisions which hold that an employer, pursuant to Section 8(a)(1), must discuss grievances with a union organizer who represents only a minority of his employees. To impose such an obligation on an employer would be an unwarranted extension of the principles of Section 8(a)(5), which Congress has deliberately confined to relations with bargaining representatives enjoying majority support.

Consequently, we reject the Board's finding that respondents committed an unfair labor practice by refusing to talk with Evanoff. No modification of the Board's order is required in this respect, however, for there were a number of related instances of interference with meetings between Evanoff and the employees which are properly substantiated.

The Board based its finding that respondetns had discharged one of their employees for testifying at a Board hearing, as well as for his union activities, on the following statements by the trial examiner:

> "As a result of the Union's petition a Board hearing was held on September 17, 20, 24 and October 2 [1962]. Between the first and second sessions . . . [Hamilton] Posner then suggested that [Marcos] Ortiz . . . not go to the hearing . . . Marcos apparently followed Posner's request and did not attend the next hearing session. He did, however, testify at the hearing on September 24."

Immediately after the hearing, Posner shifted Ortiz's work place to a storage space apart from all other employees, and seven weeks later Ortiz was laid off and not rehired. The trial examiner concluded that, in addition to his union

activities, "Marcos Ortiz was also discharged because he testified at a Board hearing after Posner had tried to persuade him not to."

There is nothing whatever in the record to support the crucial finding that Posner suggested, requested, or urged Ortiz not to attend the Board hearings. Furthermore, the shift in his work place and his subsequent discharge can be fully explained by Ortiz's union activities. He was the union delegate on the second floor of the plant, and on at least two occasions he was designated a member of the union committee in correspondence from Evanoff to Posner.

We hold that the Board has not demonstrated by substantial evidence that respondents violated Section 8(a)(4) in discharging Ortiz. Again, as was true of the unlawful interrogation, the Board has alleged no other violations of Section 8(a)(4) by respondents. Accordingly, paragraph 1(b) shall be stricken from the Board's cease and desist order, as shall the second "WE WILL NOT . . ." paragraph of the notice to be posted by respondents. However, because Ortiz, like the seven other discharged employees, was discharged for his union activities, in violation of Section 8(a)(3), the Board's order that he be reinstated with back pay must stand.

Order enforced as modified.

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 29047

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

I. POSNER, INC.; POSNER DISTRIBUTING CORP.; POSNER BEAUTY AND BARBER SUPPLY CORP.; and HAMILTON POSNER,

Respondents.

DECREE

Before:

LUMBARD, *Chief Judge,*
WATERMAN and HAYS, *Circuit Judges.*

THIS CAUSE came on to be heard upon a petition of the National Labor Relations Board to enforce its order dated January 22, 1964, directed against the Respondent I. Posner, Inc.; Posner Distributing Corp.; Posner Beauty and Barber Supply Corp.; and Hamilton Posner, their officers, agents, successors and assigns. The Court heard argument of respective counsel on January 5, 1965, and has considered the briefs and transcript of record in this cause. On March 15, 1965, the Court, being fully advised in the premises, handed down its opinion granting enforcement of the Board's order, as modified. In conformity therewith, it is hereby

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ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Second Circuit that I. Posner, Inc.; Posner Distributing Corp.; Posner Beauty and Barber Supply Corp.; and Hamilton Posner, their officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in District 65, Retail, Wholesale and Department Store Union, AFL-CIO, or in any other labor organization, by discharging, laying off, or refusing to reinstate any of its employees because of their union membership or activities, or in any other manner discriminating in regard to hire or tenure of employment, or any term or condition of employment.

(b) Theatening reprisals or promising benefits to discourage membership in any labor organization.

(c) In any other manner interfering with, restraining or coercing employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the National Labor Relations Act as amended (hereinafter called the Act).

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2. Take the following affirmative action, to effectuate the policies of the Act.

(a) Offer immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay they may have suffered by reason of unlawful discrimination against them, in the manner set forth in the section of the Trial Examiner's Decision entitled "The Remedy," to the following named employees:

Norma Pinero	Richardo Ortiz
Marcos Ortiz	George Gordon
Guillermo Cuellar	Antonio Coello
Pedro Santiago	Arthur Cooper

(b) Make available to the National Labor Relations Board or its agents, upon request, for examination and copying all records necessary for the determination of the amounts of backpay due and right of reinstatement under terms described herein.

(c) Post at its plants in New York and Long Island City, New York, copies of the notice attached hereto as "Appendix." Copies of the notice, to be furnished by the Regional Director for the Second Region, (New York, New York), shall, after being duly signed by the Respondent's authorized representative, be posted by the Respondent immediately upon receipt thereof, in conspicuous places, and maintained by it for a period of 60 consecutive days. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the aforesaid Regional Director, in writing, within 10 days from the date of this Decree, what steps the Respondent has taken to comply therewith.

/s/ J. Edward Lumbard
Judge, United States Court of Appeals for the Second Circuit

/s/ Paul R. Hays
Judge, United States Court of Appeals for the Second Circuit

Filed: March 30, 1965.

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APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

a Decree of the United States Court of Appeals enforcing, as modified an order of the National Labor Relations Board, and in order to effectuate the policies, of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT unlawfully discourage our employees from being members of DISTRICT 65, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO, or any other union.

WE WILL NOT violate any of the rights you have under the National Labor Relations Act to join a union of your choice or not to engage in any union activities.

WE WILL offer each of the employees named below reinstatement to his or her former job and will give them backpay for loss of earnings:

Norma Pinero	Richardo Ortiz
Marcos Ortiz	George Gordon
Guillermo Cuellar	Antonio Coello
Pedro Santiago	Arthur Cooper

All our employees are free to become or remain members of the Union named above, and they are also free to refrain from joining any union.

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I. POSNER, INC.; POSNER DISTRIBUTING CORP.; POSNER BEAUTY AND BARBER SUPPLY CORP.; and HAMILTON POSNER
(Employer)

Dated ..... By .....
(Representative) (Title)

Note:—We will notify the above-named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 5th Floor Squibb Bldg., 745 Fifth Ave., New York, New York, 10022 (Tel. No. 751-5500), if they have any questions concerning this notice or compliance with its provisions.